

NO. PD-0985-19

THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/10/2020
DEANA WILLIAMSON, CLERK

v.

ROBERT EARL HARRELL, JR., Appellant

**REQUESTING REVIEW FROM THE DECISION IN
CAUSE NUMBER 05-18-01133-CR
IN THE FIFTH COURT OF APPEALS,
REVERSING THE CONVICTION AND RENDERING A JUDGMENT OF
ACQUITTAL IN CAUSE NUMBER 2017-1-0644
FROM THE COUNTY COURT AT LAW #1
OF GRAYSON COUNTY, TEXAS**

**STATE'S BRIEF
ON PETITION FOR DISCRETIONARY REVIEW**

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ORAL ARGUMENT REQUESTED

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FIFTH COURT OF APPEALS
DALLAS, TX

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TABLE OF CONTENTS

LIST OF JUDGES, PARTIES & COUNSEL	ii
TABLE OF CONTENTS	iv
INDEX OF AUTHORITIES	2
STATEMENT OF THE CASE	3
STATEMENT REGARDING ORAL ARGUMENT	4
ISSUES PRESENTED	5
SUMMARY OF ARGUMENT	5
ARGUMENT	7
GROUND FOR REVIEW 1: THE APPELLATE COURT APPLIED AN IMPORTANT QUESTION OF STATE LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE COURT OF CRIMINAL APPEALS WHEN IT MISTAKENLY MERGED THE <i>CORPUS DELICTI</i> STANDARD OF REVIEW WITH THE <i>JACKSON V. VIRGINIA</i> SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW– MISAPPLYING BOTH.	7
A. EVIDENCE ADDUCED AT TRIAL	8
B. LEGAL STANDARD FOR PROVING THE <i>CORPUS DELICTI</i>	11
C. LEGAL STANDARD FOR PROVING SUFFICIENCY OF THE EVIDENCE UNDER <i>JACKSON V. VIRGINIA</i>	12
D. THE APPELLATE COURT MERGED THE STANDARD OF REVIEW FOR THE <i>CORPUS DELICTI</i> RULE WITH THE STANDARD OF REVIEW FOR SUFFICIENCY OF THE EVIDENCE UNDER <i>JACKSON V. VIRGINIA</i> –AND	

MISAPPLIED BOTH.	13
1. THE OPINION BY THE FIFTH COURT OF APPEALS	13
2. SUFFICIENT EVIDENCE ESTABLISHED THE <i>CORPUS DELICTI</i> OF A DWI	14
3. THE FIFTH COURT OF APPEALS ANALYSIS IMPROPERLY MERGED AND MISAPPLIED BOTH THE <i>CORPUS DELICTI</i> RULE AND THE SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW UNDER <i>JACKSON</i> <i>V. VIRGINIA</i>	15
PRAYER	17
CERTIFICATE OF SERVICE	18
STATE’S CERTIFICATE OF COMPLIANCE	19

INDEX OF AUTHORITIES

Federal Cases

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781,
61 L. Ed. 2d 560 (1979) 12, 13, 16, 17

State Cases

Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010) 12

Emery v. State, 881 S.W.2d 702 (Tex. Crim. App. 1994) 11, 16

Miller v. State, 457 S.W.3d 919 (Tex. Crim. App. 2015) 11

Salazar v. State, 86 S.W.3d 640 (Tex. Crim. App. 2002) 12, 16

Threet v. State, 157 Tex. Crim. 497, 250 S.W.2d 200 (1952) 16

NO. PD-0985-19

**IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

THE STATE OF TEXAS

v.

ROBERT EARL HARRELL, JR., Appellant

TO THE HONORABLE COURT OF APPEALS:

COMES NOW THE STATE OF TEXAS, hereinafter referred to as the State, and submits this Brief pursuant to the Texas Rules of Appellate Procedure and would show through her attorney the following:

STATEMENT OF THE CASE

The appellant, ROBERT EARL HARRELL, JR., was charged with, and a jury convicted him of, Driving While Intoxicated, 2d Offense. The trial court assessed punishment at 365 days imprisonment, probated for 24 months, and a \$1,000 fine.

The appellant was charged by complaint and information on July 18, 2017. (CR pp. 3, 8-9)

The appellant filed a motion to suppress on July 31, 2018. (CR pp. 31-37) That motion was denied. (RR vol. 4, p. 75)

On September 27, 2018, the appellant was convicted by a jury and sentenced by the court to 365 days in jail, probated for 24 months, and a fine of \$1,000. (RR vol. 5, p. 38; CR pp. 111-112)

The appellant filed his notice of appeal on September 27, 2018. (CR pp. 116-117) The appellant filed his brief on direct appeal, after one extension of time, on January 11, 2019. Oral argument was requested and this case was set for submission in cause number 05-18-01133-CR, on March 29, 2019. The Fifth Court of Appeals reversed and rendered the appellant's conviction on August 22, 2019.

The appellant filed its Petition for Discretionary Review which was granted on December 11, 2019. The State now files its brief.

STATEMENT REGARDING ORAL ARGUMENT

The State believes that a discussion of the legal issues in this case, specifically the difference between the law regarding the *Corpus Delicti* and the law regarding legal sufficiency of the evidence, would be aid the Court in its decision making and hereby requests oral argument.

ISSUES PRESENTED

GROUND FOR REVIEW 1:

THE APPELLATE COURT APPLIED AN IMPORTANT QUESTION OF STATE LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE COURT OF CRIMINAL APPEALS WHEN IT MISTAKENLY MERGED THE *CORPUS DELICTI* STANDARD OF REVIEW WITH THE *JACKSON V. VIRGINIA* SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW– MISAPPLYING BOTH.

SUMMARY OF ARGUMENT

The Fifth Court of Appeals has rendered a decision that applies the *corpus delicti* rule in a manner which conflicts with the applicable decisions of the Court of Criminal Appeals. The Fifth Court of Appeals found the evidence in this case insufficient to prove that the appellant was the driver of the vehicle in this case. In doing so, the Court first applied the *corpus delicti* rule as if that rule required that all elements of the offense of Driving While Intoxicated, including the identity of the perpetrator, be proven independently of any confession. The Court, excluding the appellant's admission that he was the driver, then applied the *Jackson v. Virginia* sufficiency of the evidence analysis as if it were similar to the *corpus delicti* analysis and refused to consider the appellant's admission to having driven

the vehicle.

The Fifth Court of Appeals should not have included the identity of the person Driving While Intoxicated as an element to be proven as part of the *corpus delicti*. The *corpus delicti* of driving while intoxicated is that *someone* drove or operated a motor vehicle in a public place while intoxicated. Appellant argued, and the Fifth Court of Appeals agreed, that the *corpus delicti* was not proven in this cause because there was no evidence other than the appellant's extrajudicial statements tending to prove that he was driving the car. The appellate court incorrectly applied the *corpus delicti* analysis, then compounded the mistake under *Jackson v. Virginia* by adding the confession corroboration requirement from a *corpus delicti* review to its sufficiency of the evidence review.

The appellate court improperly merged the two standards of review—*corpus delicti* and *Jackson v. Virginia* sufficiency. Because corroborating evidence should be considered *in conjunction with the extra-judicial confession*, the appellant's admission should have been part of the evidence considered in determining if the *corpus delicti* of Driving While Intoxicated was proven. In its *Jackson v. Virginia* analysis of the sufficiency of the evidence, the appellate court should never have ignored the appellant's admission that he had been driving the vehicle.

As decided, the appellate court misapplied both standards of review in their opinion.

ARGUMENT

GROUND FOR REVIEW 1:

THE APPELLATE COURT APPLIED AN IMPORTANT QUESTION OF STATE LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE COURT OF CRIMINAL APPEALS WHEN IT MISTAKENLY MERGED THE *CORPUS DELICTI* STANDARD OF REVIEW WITH THE *JACKSON V. VIRGINIA* SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW– MISAPPLYING BOTH.

The Fifth Court of Appeals has rendered a decision that applies the *corpus delicti* rule and the sufficiency of the evidence standard of review in a manner which conflicts with the applicable decisions of the Court of Criminal Appeals. The Fifth Court of Appeals found the evidence in this case insufficient to prove that the appellant was the driver of the vehicle in this case then reversed the conviction and entered an acquittal. In doing so, the Court merged the standard of review for sufficiency of the evidence in *Jackson v. Virginia* with the standard of review regarding the *corpus delicti* rule. The appellate court determined that the *corpus delicti* rule required that all elements of the offense of Driving While Intoxicated be proven– including identity–without considering the appellant’s admission

then extended that reasoning to exclude the admission from its sufficiency of the evidence review.

A. EVIDENCE ADDUCED AT TRIAL

At trial, the State offered evidence that appellant committed the offense of Driving While Intoxicated¹.

- April Cully, a dispatcher with the Van Alstyne Police Department, testified that she was a custodian of records for the 911 system used by her department. (RR vol. 3, p. 46)
- Ms. Cully identified State's Exhibit 1 (hereinafter SX1) as the 911 call from incident number 17-000194 on March 5, 2017, at 4:00 in the morning. (RR vol. 3, pp. 50, 68-69)
- State's Exhibit 1 contained statements from a 911 caller who described a gray van driving recklessly while southbound on Highway 75. (SX1, part 1, time stamp 00:16)
- Officer Brandon Blair, formerly of the Van Alstyne Police Department, testified that he received the information from dispatch of a gray van driving recklessly, with a license plate number of GRW-6089. (RR vol. 3, p. 90)
- Officer Blair was notified by the dispatcher that the 911 caller observed the gray take exit 51. (RR vol. 3, p. 90; SX 1, part 1, time stamp 2:13 & part 2, time stamp 0:10)
- Officer Blair proceeded to that exit and was further notified by the

¹ The State also presented evidence proving that the appellant had been convicted once before of a DWI offense. However, this proof is not relevant to the appellate court's analysis.

dispatcher that the 911 caller observed the gray van pull into the McDonald's parking lot and park near the gas pumps. (RR vol. 3, pp. 90-91; SX1, part 2, time stamp 0:59; SX 3, time stamp 0:03:12)

- Approximately 4 minutes and 18 seconds after the 911 call was made, the caller indicated that the driver of the gray van had pulled into McDonald's and parked near the gas pumps. (SX 1, part 1, 0:01 through part 2, 2:05)
- Approximately 29 seconds after being informed by dispatch that the gray van was now parked in the McDonald's parking lot near the gas pumps, Officer Blair located the vehicle and approached the car, observing the appellant in the driver's seat with his seatbelt still fastened. (RR vol. 3, p. 92; SX 3 time stamp 0:03:13-0:03:42)
- When Officer Blair approached the vehicle, he could smell an odor of alcohol beverage emitting from the vehicle. (RR vol. 3, p. 92)
- The appellant's eyes appeared to be bloodshot and his speech was somewhat mumbled and slurred. (RR vol. 3, pp. 93-94)
- There were two other passengers in the vehicle. (RR vol. 3, p. 93)
- The appellant informed the officer that he and the two men in the van with him had been at the Choctaw Casino since 7:30 that evening and all had been drinking (a "few beers" or maybe "three or four"). (RR vol. 3, pp. 94-95; SX 3 time stamp 0:06:30)
- Believing that the appellant might be intoxicated, the officer conducted a DWI investigation. (RR vol. 3, pp. 95-107)
- Officer Blair asked the appellant to perform three standardized field sobriety tests, namely, the HGN test, the Walk and Turn test, and the One-Leg Stand test. (RR vol. 3, pp. 97-106; SX 3 time stamp 0:09:54; 0:13:55, 0:17.06)
- During the investigation, Officer Blair testified that the appellant admitted driving the van, as follows:

Q. (By Mr. Sissney) Officer, can you -- it's

kind of quiet on the video. Can you explain the gist of the conversation right here?

A. He -- so he says to me that every time this happens -- or, he was afraid that I was going to take him downtown -- I assume, take him to jail -- every time this happens, and I asked him why. He said because every time this happens, and then he said something to me along the lines -- and so, at this point, I could see that, you know, he appears to be frustrated. So, I explained to him that I understand he may not agree with everything that was going on, but I explained to him that **he was reported as a reckless driver and -- and he says, well, I'm parked here, and I said, but you were driving and he replies, well, yeah.** (emphasis added)

Q. Okay. So, he admitted to you that he was driving?

A. That's correct.

(RR vol. 3, p. 107; SX 1, time stamp 0:17:51)

- Officer Blair determined that the appellant was intoxicated and arrested the appellant. (RR vol. 3, p. 108; SX 3, time stamp ; SX 1, time stamp 0:18:57)
- Officer Blair performed standardized field sobriety tests, namely, the HGN test, the Walk and Turn test, and the One-Leg Stand test on one passenger in the van and one standardized field sobriety test, namely, the HGN test, on the other passenger in the van. (SX time stamps 00:26:19, 00:29:37, 00:30:57, 00:36:32)
- Officer Blair determined that both passengers were intoxicated and were they were both arrested. (RR vol. 3, p. 108-109; SX 1, time stamp 0:31:42)
- One of the passengers stated that he had been sitting in the back seat asleep. (SX time stamp 00:31:40)
- The other passenger indicated that he had a physical problem with

his leg and could not perform the other standardized field sobriety tests, namely, the Walk and Turn test, and the One-Leg Stand test. (SX time stamp 00:39:15)

- That second passenger also admitted that he had been drinking. (SX 3 time stamp 00:36:17)
- The appellant, after being arrested for DWI, refused to provide a blood sample. (RR vol. 3, p. 114)
- Officer Blair obtained a search warrant and obtained a blood sample from the appellant. (RR vol. 3, p.)
- The blood sample taken from the appellant pursuant to a search warrant indicated that the appellant's blood alcohol content was .095. (RR vol. 3, pp. 241-242)

B. LEGAL STANDARD FOR PROVING THE *CORPUS DELICTI*

The *corpus delicti* rule “is one of evidentiary sufficiency affecting cases in which there is an extrajudicial confession.” *Miller v. State*, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015). Under that rule, a defendant's extrajudicial confession alone is not legally sufficient evidence of guilt; rather, there must be 1) independent evidence of the *corpus delicti*, and 2) that independent evidence shows that someone, not necessarily the accused, probably committed the “ ‘essential nature’ ” of the charged crime. *Id.*; see *Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994).

The *corpus delicti* rule requires some corroboration of a defendant's

extrajudicial confession regarding the commission of a crime, but *does not* require that the corroborating evidence prove that the defendant was the criminal perpetrator. *Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002).

C. LEGAL STANDARD FOR PROVING SUFFICIENCY OF THE EVIDENCE UNDER *JACKSON V. VIRGINIA*

Only under a sufficiency of the evidence standard under the *Jackson v. Virginia*, does the identity of the person committing the crime come into the analysis. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When reviewing sufficiency of the evidence, all of the evidence is viewed in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 898–900 (Tex. Crim. App. 2010)(plurality opinion). The corroboration of a defendant’s admission or confession—as required in establishing the *corpus delicti*—is *not* a part of the sufficiency of the evidence review under *Jackson v. Virginia*.

D. THE APPELLATE COURT MERGED THE STANDARD OF REVIEW FOR THE *CORPUS DELICTI* RULE WITH THE STANDARD OF REVIEW FOR SUFFICIENCY OF THE EVIDENCE UNDER *JACKSON V.*

VIRGINIA—AND MISAPPLIED BOTH.

The Fifth Court of Appeals failed to apply the proper standard of review for both a *corpus delicti* review and a sufficiency of the evidence review as set out in prior cases decided by the Texas Court of Criminal Appeals.

1. THE OPINION BY THE FIFTH COURT OF APPEALS

In its decision the Fifth Court of Appeals stated that the *corpus delicti* rule had not been satisfied because the State failed to prove that the appellant was the driver of vehicle apart from his admission to Officer Blair that he had driving the van. (Appellate Court Opinion, pp. 4-5)

The the appellate court jumped to a sufficiency of the evidence review under *Jackson v. Virginia*, and decided that, after excluding the admission made by the appellant that he had driven the vehicle, the evidence was not sufficient to prove that the appellant was the driver of the vehicle prior to parking in the McDonald's parking lot. The Fifth Court of Appeals stated that “other than Harrell’s statements to Officer Blair, there was no other evidence from which a jury could rationally conclude that

Harrell was operating the vehicle in a public place while intoxicated.

Consequently, the evidence is insufficient to support Harrell's conviction for driving while intoxicated." (Appellate Court Opinion, p. 6)

2. SUFFICIENT EVIDENCE ESTABLISHED THE *CORPUS DELICTI* OF A DWI

The evidence, proving that a DWI had occurred included:

- that a vehicle was observed to be driving recklessly,
- that the person observing the vehicle being driven recklessly called 911 and reported the reckless driving,
- that the 911 caller continued to follow the vehicle being driven recklessly and reported what exit it took, and where it eventually parked,
- that the vehicle matching the description given by the 911 caller was located by the officer less than a minute later at the place described by the 911 caller,
- that the appellant was sitting in the driver's seat with his seatbelt buckled with the car off less than 30 seconds after the 911 caller observed the gray van park,
- that the appellant admitted that he and his two friends were all

drinking at the casino in Oklahoma since 7:30 that evening,

- that the appellant admitted driving the vehicle,
- that the appellant was given roadside sobriety tests and failed,
- that the appellant's breath sample exceeded .08, and
- that the only other passengers in the vehicle were also intoxicated.

Based on this information, the evidence clearly proved that someone, most likely the appellant, committed the offense of Driving While Intoxicated.

3. THE FIFTH COURT OF APPEALS ANALYSIS IMPROPERLY MERGED AND MISAPPLIED BOTH THE *CORPUS DELICTI* RULE AND THE SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW UNDER *JACKSON V. VIRGINIA*.

The Fifth Court of Appeals erred twice in their analysis of this case. First, they applied the *corpus delicti* rule and added the requirement that the State prove the identity of the person who had committed a the DWI. Second, the appellate court merged the *corpus delicti* rule into a sufficiency of the evidence review, improperly ignoring the appellant's admission, and finding that there was insufficient evidence to prove that the appellant committed the DWI.

The *corpus delicti* of driving while intoxicated is that *someone* drove

or operated a motor vehicle in a public place while intoxicated. *Threet v. State*, 157 Tex. Crim. 497, 250 S.W.2d 200 (1952). The evidence presented at trial in this case satisfies the *corpus delicti* rule. It assures that the very crime to which appellant confessed, and for which he was prosecuted, actually happened. *Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002). This is all that is required by the *corpus delicti* rule, under *Miller* and *Emery, supra*. The Fifth Court of Appeals should not have required proof of the identity of the person driving while intoxicated as an element to be proven as part of the *corpus delicti* of a DWI.

The Fifth Court of Appeals also should not have merged the *corpus delicti* rule into the *Jackson* sufficiency standard of review. The appellant argued, and the Fifth Court of Appeals agreed, that the *corpus delicti* was not proven in this cause because there was no evidence *other than his extrajudicial statements* tending to prove that the appellant was driving the vehicle, and as a result, the evidence was insufficient. This in effect added the *corpus delicti* corroboration requirement to the *Jackson v. Virginia* standard of reviewing the sufficiency of the evidence.

There is no logical reason the appellate court should have merged the identity requirement under a *Jackson v. Virginia* review into its *corpus delicti* analysis. There is no logical reason why the appellate court would

merge the corroboration requirement regarding admissions or confessions in a *corpus delicti* review with the *Jackson v. Virginia* analysis of the sufficiency of the evidence. The merger of these two standards was improper, resulting in the misapplication by the appellate court of both the *corpus delicti* rule and the *Jackson v. Virginia* standard of review.

PRAYER

WHEREFORE, the state respectfully prays this court grant the State's Petition for Discretionary Review and remand this case back to the Fifth Court of Appeals for a proper review.

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STATE'S CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface and word limit requirements of the Texas Rules of Appellate Procedure. This document contains 3,001 words, exclusive of the caption, the identity of parties and counsel, the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the statement of issues presented, the statement of jurisdiction, the statement of procedural history, the signature, the proof of service, the certification, the certificate of compliance, and the appendix.

/s/ Karla Baugh

JANUARY 9, 2020
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